Direct Transit, Inc. *and* Teamsters Local Union No. 166 a/w International Brotherhood of Teamsters, AFL–CIO. Case 31–CA–19095

February 17, 1993

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On November 30, 1992, the National Labor Relations Board issued its Decision and Order in this proceeding adopting the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by, inter alia, closing its Daggett, California facility and laying off indefinitely all of its bargaining unit employees because of their actions in pursuing union representation.[1] The Board further adopted the judge's recommendation that a bargaining order was warranted to remedy the Respondent's unfair labor practices.

On December 4, 1992, counsel for the General Counsel moved that the Board reconsider and modify its Decision and Order. On December 11, 1992, the Respondent filed an opposition to counsel for the the General Counsel's motion.

In her motion, counsel for the General Counsel avers, with supporting documentation, that she simultaneously filed with the Board both a brief in support of the judge's decision and exceptions ''challeng[ing] the Administrative Law Judge's failure to issue a bargaining order based on Section 8(a)(5) as well as Section 8(a)(3) and (1) of the Act.'' However, counsel for the General Counsel notes that in footnote 1 of its Decision and Order, the Board acknowledged only the filing of her supporting brief and did not consider or rule on her exceptions in which she excepted to the judge's failure ''to recommend that Respondent be ordered to cease and desist from refusing to recognize and on request, bargain with the Charging Party Union . . . .'' Accordingly, counsel for the General Counsel submits that in light of her timely filed exceptions, extraordinary circumstances exist as required by Section 102.48(d)(1) of the Board's Rules and Regulations to support her motion for a bargaining order and notice based upon violations of Section 8(a)(5), (3), and (1).

The Respondent argues in opposition that paragraph 2(c) of the Board's Order already provides for a bargaining order,[2] and ''[t]here is no difference in any material respect between what the General Counsel is asking the Board to do and what the Board has already done.'' Accordingly, the Respondent contends that counsel for the General Counsel has failed to allege ''extraordinary circumstances'' or specify ''material error'' in the underlying proceeding as required by Section 102.48 and that her motion must, therefore, be denied.

We find merit in counsel for the General Counsel's motion. With respect to the alleged error in the Board's failure to acknowledge in footnote 1 of its decision that counsel for the General Counsel filed exceptions, the Board's records show that she filed exceptions with the Board's Executive Secretary on the same day that her brief in support of the judge's decision was filed. However, the exceptions were inadvertently not forwarded to the Board for consideration. Accordingly, we correct footnote 1 of our decision to reflect counsel for the General Counsel's timely filing of exceptions to the judge's decision.[3]

We further find merit in counsel for the General Counsel's motion with respect to the alleged failure by the judge to base his bargaining order on a violation of Section 8(a)(5), as well as Section 8(a)(3) and (1). Counsel for the General Counsel alleged a violation of Section 8(a)(5) in the amended complaint and, although the judge did not specifically find that the Respondent violated that section of the Act, he found the elements of an 8(a)(5) violation based on the undisputed evidence that a majority of unit employees signed valid authorization cards and that the Union made a lawful demand for recognition upon the Respondent prior to the closure of the Daggett facility. Accordingly, we find that a bargaining order based on Section 8(a)(5) and (1) is warranted, in addition to the bargaining order granted by the judge and adopted by the Board based on the judge's 8(a)(3) and (1) findings. We further find, as requested in counsel for the General Counsel's exceptions, that an order requiring the Respondent to cease and desist from refusing to bargain is warranted.

Accordingly, for the reasons stated above, we grant counsel for the General Counsel's motion for reconsideration and, consistent therewith, we shall further modify the judge's recommended Order and our original Order dated November 30, 1992, in the manner set forth below.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified by our Order dated November 30, 1992, and orders that the Respondent, Direct Transit, Inc., Daggett, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(e) and reletter the paragraphs accordingly.

[1] 309 NLRB 697.

[2] The judge granted the bargaining order in par. 2(c) of his recommended Order, and the Board adopted it.

[3] The second sentence of fn. 1 of the Decision and Order is modified to read as follows: ''The Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions and a brief in support of the judge's decision.''

''(e) Refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit set forth below.''

2. Substitute the attached notice for that attached to the Board's underlying Decision and Order.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT shut down a maintenance facility and terminate our employees because they seek union affiliation for purposes of collective-bargaining representation.

WE WILL NOT demote an employee from a leadman position because of his activity on behalf of union organization.

WE WILL NOT threaten employees with shop closure because of their interest in or activity on behalf of the Union.

WE WILL NOT interrogate employees about their interest in or activity on behalf of the Union.

WE WILL NOT refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All mechanics, mechanic leadman, mechanic trainees, and fuel and wash employees employed by the Respondent at its facility located at 34760 Daggett/Yermo Road, Daggett, California; but excluding office clerical employees, guards, and supervisors, as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL reestablish and resume operations at our Daggett, California facility in a manner consistent with the level and manner of operation that existed before the facility was closed on October 6, 1991.

WE WILL offer reinstatement to all employees laid off on that date who held a position in the bargaining unit set forth above.

WE WILL make them whole for losses they incurred as a result of the discrimination against them, with interest.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit set forth above concerning terms and conditions of employment and, if an understanding is reached, WE WILL embody the understanding in a signed agreement.

WE WILL offer Ivan Elvik reinstatement to his former position of leadman and make him whole, with interest, for any losses he incurred as a result of his unlawful demotion.

DIRECT TRANSIT, INC.